

No. 83-379

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In the Supreme Court of the United States

OCTOBER TERM, 1983

ESTATE OF CORDIAL GRYDER, DECEASED,
PANSY GRYDER, EXECUTRIX, AND PANSY GRYDER,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT*

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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The Tax Court, in a memorandum decision, determined that petitioners were liable for deficiencies in tax and civil fraud penalties. The court of appeals affirmed, rejecting petitioners' arguments that the statute of limitations barred the assessments, that the Tax Court had erred in admitting certain evidence, and that petitioner Pansy Gryder should be relieved of liability for deficiencies on returns filed jointly with her husband on the theory that she was an "innocent spouse." Petitioners seek review of these holdings.

1. The pertinent facts may be summarized as follows: Cordial Gryder, now deceased, was the principal officer and shareholder of DeVille Motors, Inc. During 1967-1971, Cordial caused DeVille to pay, out of its corporate bank accounts, numerous personal expenses incurred by him and his wife, Pansy Gryder (Pet. App. A2). Corporate funds

were used to pay the Gryders' household utility bills, to finance improvements to their home, to make mortgage payments on their real estate, and to purchase stock and other property titled in their names and devoted exclusively to their use. The Gryders failed to report these disbursements as income on their joint tax returns, and DeVille reduced its own tax liability by deducting many of the items as business expenses. In December 1975, Cordial was convicted in federal district court of willfully filing fraudulent tax returns for 1967-1971. Pet. App. A2.¹

The Commissioner in February 1976 sent deficiency notices to the Gryders, and in July 1976 sent deficiency notices to DeVille, asserting deficiencies in tax and civil fraud penalties under Section 6653(b) of the Code.² Petitioners sought redetermination of the deficiencies in the Tax Court, which (with minor exceptions not relevant here) upheld the Commissioner's proposed assessments.³ It determined that there were underpayments of tax on the Gryders' joint returns for 1967-1971, and found as a fact that each such underpayment was due to Cordial's fraud (Pet. App. A11). It also found that there were underpayments of tax on DeVille's corporate returns for 1967-1970, that these underpayments were due to Cordial's fraud, and that Cordial was liable for DeVille's taxes and penalties as its transferee (*ibid.*). The court of appeals unanimously affirmed (Pet. App. A1-A5).

¹Cordial died while his conviction was on appeal to the Eighth Circuit, which thereupon vacated the conviction and remanded for dismissal on mootness grounds (Pet. App. A2). The criminal case is not involved here.

²Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended ("the Code" or "I.R.C.").

³The Tax Court's memorandum opinion, excerpts of which are printed in petitioners' appendix (Pet. App. A7-A22), is unofficially reported at 50 T.C.M. (P-H) 1777 (1981).

2. Petitioners contend (Pet. 8-12) that the Commissioner was barred by the statute of limitations from asserting tax deficiencies and fraud penalties against them. The court of appeals correctly held (Pet. App. A4) that "[t]his contention is wholly without merit."

Section 6501(a) provides, as a general rule, that taxes "shall be assessed within 3 years after the return was filed." Section 6501(c)(1) sets forth an exception to the general rule applicable "[i]n the case of a false or fraudulent return with the intent to evade tax," providing that, in such cases, "the tax may be assessed * * * at any time." Petitioners do not challenge the Tax Court's finding, upheld on appeal (Pet. App. A4), that their returns for 1967-1971 were "false or fraudulent" and were filed "with the intent to evade tax." Because the statute explicitly permits the Commissioner to assess the tax "at any time" in fraud cases, it is immaterial that the deficiency notices (mailed in 1976) were sent more than three years after the fraudulent returns were filed.

There is no merit to petitioners' contention (Pet. 11) that the Commissioner "arbitrarily delay[ed]" in sending the deficiency notices and that this supposed delay should somehow cause the general three-year statute of limitations, applicable in non-fraud cases, to apply here. Petitioners cite no authority for the proposition that a statute of limitations can be construed on an ad hoc basis, depending on a court's perception of how much time the government really needs, on the facts of a particular case, to assert a particular claim. Indeed, it has long been established that statutes of limitations "must receive a strict construction in favor of the Government" (*E.I. DuPont de Nemours & Co. v. Davis*, 264 U.S. 456, 462 (1924)), and that the United States is not subject to the defense of laches. *United States v. Summerlin*, 310 U.S. 414, 416 (1940).

Contrary to petitioners' contention (Pet. 10-11), this case has nothing to do with the circuit conflict represented by cases like *Dowell v. Commissioner*, 614 F.2d 1263 (10th Cir. 1980), petition for cert. pending, No. 82-1873, and *Badaracco v. Commissioner*, 693 F.2d 298 (3d Cir. 1982), cert. granted, No. 82-1453 (May 16, 1983). This Court in *Badaracco* granted certiorari to resolve a conflict among the circuits as to whether the filing of a nonfraudulent amended return, subsequent to the filing of a fraudulent original return, has the effect of triggering the general three-year limitations period of Section 6501(a). As noted below (Pet. App. A4 n.6), none of the taxpayers involved in this case filed (nor do they contend that they filed) amended returns for any of the tax years at issue. The *Badarracco* line of cases has no relevance here, and there is no reason to delay disposition of this petition pending the Court's decision in *Badaracco*.

3. Petitioners also contend (Pet. 12-15) that the Tax Court erred in permitting the government to prove the contents of certain documents by means of secondary evidence. The Tax Court found (Pet. App. A16) that the originals of the documents had been destroyed, negligently but in good faith, by IRS employees after Cordial's criminal trial. The court of appeals held this factual finding not clearly erroneous, and accordingly concluded that the government's secondary evidence — consisting of photocopies of certain corporate records, cancelled checks, bank statements, and loan ledgers, as well as the transcript of testimony at Cordial's criminal trial — was admissible, under Rule 1004 of the Federal Rules of Evidence, to prove the originals' contents.⁴ The courts below properly rejected

⁴Rule 1004 provides that "other evidence of the contents of a writing . . . is admissible if (1) [a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith"

(Pet. App. A3, A16-A17) petitioners' contentions (reiterated here) that the record concerning the IRS' good faith was "hopelessly confused" (Pet. 14) and that the trial transcript was inadmissible hearsay (Pet. 15-17). In any event, these factual questions do not merit this Court's review.

4. Finally, petitioner Pansy Gryder contends (Pet. 17-22) that she should be relieved of liability for tax deficiencies on returns filed jointly with her husband on the theory that she was an "innocent spouse." Section 6013(e)(1) provides that a spouse shall be relieved of liability if he or she "establishes that in signing the [joint] return he or she did not know of, and had no reason to know of," the omissions from income, and if, "taking into account whether or not [such spouse] significantly benefited directly or indirectly from the [omitted items] and taking into account all other facts and circumstances, it is inequitable to hold [him or her] liable" for the resulting tax deficiencies. The Tax Court specifically found (Pet. App. A20-A22) that petitioner failed to carry her burden of proving her entitlement to the "innocent spouse" exception, and the court of appeals held (*id.* at A5) that this finding was not clearly erroneous. There is no basis for further review of this factual question.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1983